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BEFORE THE ARIZONA CORPORATION C



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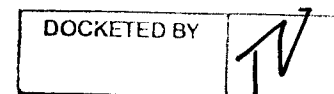
COMMISSIONERS

Susan Bitter Smith, Chairman
Bob Burns, Commissioner
Doug Little, Commissioner
Bob Stump, Commissioner
Tom Forese, Commissioner

Arizona Corporation Commission

DOCKETED

AUG 26 2015



IN THE MATTER OF THE)
APPLICATION OF CIRCLE CITY)
WATER COMPANY, LLC FOR)
DELETION OF A PORTION OF ITS)
EXISTING CERTIFICATE OF)
CONVENIENCE AND)
NECESSITY FOR WATER SERVICE)
_____)

Docket No. W-03510A-13-0397

**RESPONSE TO
MOTION TO DISMISS**

On November 19, 2013 after numerous meetings and discussions with the developer, Harvard Investments ("Harvard"), Circle City Water Co. LLC ("CCWCo") filed its Application for Approval to Delete Portions of its Certificate of Convenience and Necessity ("CC&N") (also the "Application"). Harvard states in its Motion to Dismiss (the "Motion") that it is the "controlling" owner of the subject project. The Application was timely filed shortly after Harvard assured CCWCo that the project subject to the original extension of its CC&N, granted under Arizona Corporation Commission ("ACC") Decision No. 68246 (the "Decision") dated October 25, 2005, was "not viable" and that no future date of when, or if ever, the phases of the Lake Pleasant 5000 Project (the "Project") would be built. Harvard, in its assurances to CCWCo, further convinced CCWCo that the Project would "likely never be built" by voluntarily offering to pay at

1 least half of the engineering, legal, and related expenses to “immediately unwind” and
2 terminate the Project, Water Facilities Agreement (“WFA”), and arrangements with the
3 Central Arizona Groundwater Replenishment District (“CAGRD”) for Phase I of the
4 Project also known as Warrick 160. Despite Harvard’s later recounted ascertains that the
5 non-controlling Project Owner was determined to develop the Project, CCWCo
6 proceeded with the filing of its Application.

7 **I. DECISION NO. 68246**

8 It has been nearly ten years since the Decision – to be more accurate 3,588 days. In
9 that entire period there has not even been a construction schedule developed, much less,
10 any on-site construction work started on the Project. CCWCo has repeatedly asked
11 Harvard for a construction schedule or its “best guess” future date as to when
12 construction may be started. Harvard has, likewise, repeatedly replied “it doesn’t have a
13 construction schedule” and “it doesn’t have a projected future construction start date”. At
14 the same time, controlling owner Harvard, continues to state that the Project is now
15 viable and requires future water service despite the fact that representatives of the Project
16 owners have suggested CCWCo should “buy the project” from them.

17 It is clear from the Decision, the original Application for Extension of Certificate of
18 Convenience and Necessity dated March 2, 2005¹ (“Application for Extension”) also
19 supported by Harvard; the WFA dated March 1, 2005; the ACC Staff Report dated June
20 28, 2005; The ACC Staff Report dated October 17, 2014; and other related documents
21 that CCWCo and the ACC expected the Project to be imminently developed and
22 constructed. At the time of the Decision there was no expectation among any of the
23 parties that, ten years later Harvard, would not even be able to determine a projected
24 Project start date. CCWCo and the ACC relied on Harvard to begin construction of the
25 Project by the end of 2005. In the Application for Extension it is clearly stated that “The
26 starting date for construction of facilities at the Development is approximately late
27 2005” (see Docket No. W-03510A-05-0146, page 4, lines 23-24).

¹ See related Docket No. W-03510A-05-0146.
Docket No. W-03510A-13-0397

1 The Decision also provided for an additional condition. In Findings of Fact number 37
2 (see Decision page 9, lines 19-27) Staff insisted on inserting an additional condition that
3 required CCWCo to demonstrate a “positive impact” on its existing 169 customers in its
4 next rate case. This insidious additional condition has caused CCWCo severe difficulties
5 and significant operating losses for far too many years.

6 At Hearing in 2005 and every subsequent filed document thereafter, CCWCo opposed
7 Staff’s insistence of this additional condition. In its Application, CCWCo sought to have
8 this additional condition eliminated. Staff supported CCWCo in its October 17, 2014
9 Staff Report (see ACC Staff Report, page 6, Recommendations, second sentence).
10 Harvard chose to oppose CCWCo and Staff’s Report until its recent Motion dated August
11 10, 2015. The reasons for this opposition, which would have little effect on the balance of
12 their opposition to remaining portions of the Application are not clear. What is clear is
13 that both CCWCo and Staff had no expectation that, ten years later, Harvard would not
14 have begun the Project, would have no estimated Project start date, and would not have
15 even developed a Project schedule for development. During this period CCWCo was
16 barred from seeking rate relief because it would have been impossible to demonstrate
17 the “positive impact” on existing customers using a Project that had not been
18 developed. Thus, CCWCo’s operating losses mounted and continued while Harvard did
19 not prosecute the Project. During the same period CCWCo continued to make
20 burdensome annual CAP M&I charge payments in an effort to preserve the Project.

21 More harmful than Staff’s additional “positive impact” condition is Harvard’s failure
22 to proceed with the Project as expected under the Application for Extension. Obviously,
23 both Staff and CCWCo expected that an imminently developed Project would render the
24 “positive impact” additional condition largely moot. That was the basis for CCWCo’s
25 reluctant acquiescence to the additional condition at the time of Hearing. Harvard’s
26 failure to proceed with the Project caused the additional “positive impact” condition to be
27 far more applicable – for nearly ten years!

1 **II. FINANCIAL, OPERATIONAL AND MANAGEMENT IMPACT ON**
2 **CIRCLE CITY WATER Co LLC CAUSED BY HARVARD'S FAILURE**
3 **TO TIMELY DEVELOP THE PROJECT AS EXPECTED.**
4

5 In the Motion Harvard argues that there were “well documented economic issues”
6 that caused “community development to be put on hold” for “several years across the
7 country”. Harvard would like to portray its efforts as diligently working on the Project
8 during this period. The reality is that Harvard did not begin construction development
9 of the Project in late 2005, as provided in the Application for Extension; did not
10 develop a proposed construction schedule; and could not determine whether or not the
11 Project would ever get built.² In fact, **no communication in the form of an update**
12 **status was provided by Harvard to CCWCo for more than eight years.** Ultimately, it
13 was CCWCo who engaged Harvard as to an explanation as to the Project status and
14 development schedule after which it learned that the Project was not viable, needed to
15 be “unwound”, and all agreements and arrangements associated with the Project
16 needed to be termination, AND that Harvard would cooperate with CCWCo in
17 ensuring that all such arrangements were closed as soon as possible.

18 CCWCo is a very small, Class E public service corporation located in the Phoenix
19 Advanced Management Area in northwest Maricopa County, approximately 15 miles
20 south of Wickenburg, AZ on State Highway 60. For the periods indicated below in
21 Table 1, CCWCo has had the following revenues from operations:

22 **TABLE 1:**

<u>Year</u>	<u>Revenues</u>
2005	\$59,883
2006	\$61,616
2007	\$60,006
2008	\$63,367
2009	\$62,465

² Discussion offered from Harvard during meeting with CCWCo on or about April 11, 2013.
Docket No. W-03510A-13-0397

2010	\$62,388
2011	\$59,195
2012	\$55,903
2013	\$57,355
2014	\$60,270

For the same period, CCWCo has achieved annual operating losses from operations as shown in Table 2 below:

TABLE 2:

<u>Year</u>	<u>Profit/Loss</u>
2005	\$-125,553
2006	\$-126,344
2007	\$-129,411
2008	\$-138,721
2009	\$-132,947
2010	\$-86,414
2011	\$-87,375
2012	\$-74,445
2013	\$-47,560
2014	\$-78,073

Since the date of the Decision, CCWCo has incurred more than \$771,000 in annual costs and charges related to Municipal and Industrial Charges (“M&I Charges”) for maintaining the water supply contract for Central Arizona Project (“CAP”) water from the Central Arizona Water Conservation District (“CAWCD”). CCWCo’s losses for the same period since the ACC’s approval of the Decision exceed \$1,026,000.³ But for

³ Harvard’s argument that CCWCo’s incurrence of CAP annual M&I charges are the reason for the periodic losses for the period since 2005 cannot be supported. CCWCo operating losses have exceed the costs of annual CAP M&I charges by a considerable amount.

1 CCWCo's support of Harvard's Phase I Member Lands status in the CAGR D there might
2 not be any Project for the parties to be arguing over. It is ONLY because of CCWCo's
3 continuance to incur horrendous annual CAP M&I charges that Harvard has any basis
4 whatsoever for an argument that the Project has any viability at all.

5 Arrogantly, it was not until Harvard's Motion that it even considered agreeing with
6 CCWCo and ACC Staff that the "positive impact" condition, erroneously applied by the
7 Decision, maintained CCWCo in a hamstrung position so that it could not apply to the
8 ACC for rate relief. Because of Harvard's position to continue to oppose the termination
9 of the "positive impact" condition Harvard has irresponsibly caused CCWCo severe and
10 irreversible financial, economic, and operational harm through its self-interests of
11 protecting a Project for which it has stated is "not viable" and still has no idea when the
12 Project will be developed. Harvard has known all along that surrendering its opposition to
13 the "positive impact" condition caused no substantial effect on its argument opposing the
14 balance of CCWCo's Application – yet, irresponsibly, it chose not to do so until it filed
15 its Motion.

16 **III. DOES CIRCLE CITY WATER CO REMAIN A "FIT AND PROPER"**
17 **ENTITY?**
18

19 In the October 21, 2015 Staff Report (revised), at page 4, it states the criteria for
20 considering an application as in the case on the instant Application. The issues in a
21 deletion application relate to whether the applicant continues to be fit and proper with
22 the financial, managerial and technical capabilities to serve the public. The failure of
23 Harvard to develop the Project over a significant period of time, not expected at the time
24 of the Decision, and CCWCo's continuing burdensome obligation to fund the annual
25 CAP M&I charges, without reimbursement from Harvard, certainly raise the issue of
26 CCWCo's ability to serve a project the size of Lake Pleasant 5000 - in addition to its
27 existing customers. The financial burdens of the last ten years have eroded CCWCo's
28 financial, managerial, and technical ability to serve its customers – much less the
29 additional 10,000 customers contemplated by the Project. CCWCo may no longer be able
30 to afford to carry the annual cost of the CAP agreement. The seriousness of this situation

1 is critical. CCWCo has been negatively affected by Harvard's failure to develop the
2 Project, as originally anticipated by CCWCo and the ACC, and their selfishness in only
3 recently agreeing with CCWCo and Staff to eliminate the "positive impact" condition of
4 the Decision places CCWCo's ability to serve the Project and its existing customers very
5 much in jeopardy.

6 7 **IV. PUBLIC INTEREST**

8 Harvard's argument in its Motion, as it relates to public interest, is incredible. On
9 one hand Harvard argues that "certainty of Commission orders" is imperative to have an
10 efficient and functioning regulatory environment. It further argues that allowing a utility
11 to "unilaterally" file an application to modify or delete a portion of its CC&N is not in the
12 public interest. Further, it argues that other parties would be required to unnecessarily
13 spend money investing in projects when a basis of service already exists. Most
14 offensively, Harvard argues that CCWCo "enriched" itself by asking for reimbursement
15 of advanced costs (at no profit) for engineering and legal fees associated with qualifying
16 the Project – costs that were clearly due and payable years before being actually paid
17 under the WFA. The same fees were agreed by Harvard to be paid for as part of preparing
18 the Project to be a viable Project – for which it subsequently determined was not viable.

19 First, Harvard seems to hold CCWCo and the ACC to a higher standard than it
20 holds itself. Under the Decision and the WFA, CCWCo has continued to complete and
21 provide all of the requirements detailed thereof. CCWCo continued to pay annual CAP
22 M&I charges in support of the Project. As provided in the Application for Extension, a
23 filing supported by Harvard, the Project was contemplated to begin by late 2005. It is
24 Harvard, however, that still can't provide a date when the Project will be developed.
25 Harvard is required to provide fair and honest dealings and not enter into contracts or
26 agreements that it knows, in advance, it has no intention of or will not honor or complete.
27 It is far more in the public interest to have public service corporations with
28 responsibilities to provide high quality and sufficient quantities of water to existing
29 customers to be placed at financial and operational risk of not being able to do so because

1 a developer doesn't develop a Project until all the economic conditions are favorable.
2 Even worse, for Harvard to oppose termination of the "positive impact" provision of the
3 Decision until very recently clearly indicates that it has no intention of cooperatively
4 working with CCWCo in the performance of the requirements of the Project.

5 Second, Harvard argues that allowing a utility to "move forward unilaterally" with
6 the filing of an application for deletion of a CC&N is not in the public interest. Harvard
7 well knows that CCWCo timely filed the Application in protection of its customers and
8 its business interests and had every right and regulatory standing to file the Application.

9 Third, and most astounding, is that Harvard argues CCWCo undeservedly
10 "enriched" itself by accepting Harvard's reimbursement payment for engineering and
11 legal expenses related to completing the Application for Extension, the WFA, and ACC
12 hearing costs. These 2005-2006 costs were charged to Harvard at cost, without markup,
13 and were not paid by Harvard until 2013. It is very difficult to understand how Harvard
14 could possibly consider such reimbursed costs as enrichment – especially, in light of
15 CCWCo's investment in annual CAP M&I charges totaling more than \$771,000 since the
16 Decision.

17 Harvard's argument for CCWCo's enrichment is a red herring and should be
18 ignored. The charges paid by Harvard were owed under the WFA anyway.⁴ Harvard paid
19 CCWCo for the engineering and legal charges approximately eight years after the costs
20 were incurred. Even in Harvard's word, "we are property rich and cash poor"⁵ it is very
21 difficult to seriously consider Harvard's argument toward enrichment.

22 **V. NEED FOR SERVICE**

23 In its Motion Harvard argues that it needs water service to the Project. Harvard
24 also argues that deletion of the extension of the CC&N by means of granting CCWCo's
25 Application would destroy the "economic viability" of the Project and cause "irreparable
26 harm" to Harvard and the Project owners. Harvard cites that a smaller planned
27 community in the local area required more than 30 years to reach build out.

⁴ See WFA at pages 2-3, Section II, subparagraph 5.

⁵ Chris Cacheris of Harvard during meeting on or about April 11, 2013.

1 Harvard seems to be incredulous to the harm and damage caused CCWCo through
2 its incurrence of annual CAP M&I charges totaling approximately \$771,000 in support of
3 the Project. Harvard has reimbursed CCWCo none of the annual CAP M&I charges
4 throughout the period since the Decision.

5 A fair and objective reading of the facts related to the Application causes one to
6 ask obvious questions:

7 (1) Does Harvard ever really expect to develop the Project?

8 (2) Is Harvard's actual interest in CCWCo's water service and use of its
9 CAP water allocation a ruse to maintain project value in the actual
10 interest of a sale to a buyer at a future time?

11 (3) Why would Harvard oppose CCWCo's efforts, at every turn, to
12 terminate the "positive impact" condition of the Decision and wait
13 until the eleventh hour of the Motion to finally agree to join CCWCo
14 and ACC Staff in opposition thereof?

15 (4) If Harvard and the Project owners were convinced of the viability of
16 the Project, why would they offer the Project for sale to CCWCo?

17 With no Project built, no Project construction schedule developed, no actual
18 construction begun, and no verifiable start date to the Project, Harvard is enriching itself
19 on the backs of CCWCo, its customers, and at CCWCo's expense. Such enrichment, by
20 Harvard, is NOT in the public interest, in the interest of existing CCWCo customers, and
21 not in the interest of the utility regulatory community. The arguments made by Harvard
22 in its Motion are shallow and transparent.

23 VI. CONCLUSION

24 For the foregoing reasons and argument Harvard's Motion should be rejected.
25 CCWCo should have its opportunity to expose the actual reasons for Harvard's conduct
26 since 2005 and seek actual, plausible explanations, if they exist, at a public hearing in this
27 matter. Further, as a matter of public interest, customer interest, and objective fairness
28 Harvard should be made to explain its actions, lack of actions, decisions, and other

1 related facts and circumstances at a public hearing in this matter. Harvard's Motion
2 should be rejected.

3
4 RESPECTFULLY SUBMITTED this 25th day of August 2015.

5 Circle City Water Company, LLC

6
7 By: 

8 Robert T. Hardcastle

9 *In Propria Persona*
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12 ORIGINAL and 13 copies filed
13 this 25th day of August 2015, with:
14

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16 **Arizona Corporation Commission**
17 **1200 West Washington St.**
18 **Phoenix, AZ 85007**
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20 And copies mailed to the following:

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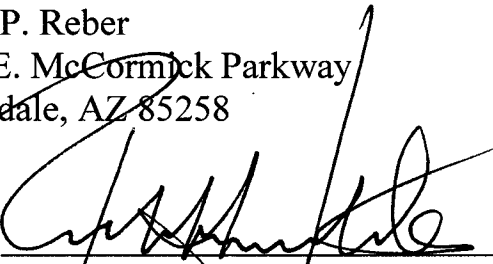
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1 Date: August 25, 2015

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